

Before the  
Federal Communications Commission  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Availability of INTELSAT Space Segment  
Capacity to Users and Providers Seeking to  
Access INTELSAT Directly

IB Docket No. 00-91

To: The Commission

**REPLY COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.  
AND WORLDCOM, INC.**

Sprint Communications Company L.P. ("Sprint") and WorldCom, Inc. ("WorldCom")  
hereby reply to the initial round of comments on the Commission's Portability NPRM.<sup>1</sup>

**I. Introduction and Summary**

The commenters agree on two critical points – (1) that capacity available to access the INTELSAT system from the United States is extremely limited and (2) that limitations on INTELSAT capacity restrict the availability of direct access.<sup>2</sup> Even COMSAT Corporation ("COMSAT") does not dispute these facts, which are determinative of the basic inquiry mandated by the ORBIT Act<sup>3</sup> – i.e., whether "users or providers of telecommunications services

<sup>1</sup> Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly, FCC 00-186, IB Docket No. 00-91 (rel. May 24, 2000) ("Portability NPRM").

<sup>2</sup> As discussed below, the comments of Lockheed Martin Corporation, the prospective parent of COMSAT Corporation, do not squarely address these factual issues, but instead advance a series of arguments for delay in this proceeding.

<sup>3</sup> Pub. L. 106-180, 114 Stat. 48 (2000).

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have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements.”<sup>4</sup> Accordingly, the Commission is required to take “appropriate action” to remedy INTELSAT capacity limitations.<sup>5</sup> The only real dispute in this proceeding involves the nature of the actions that the Commission should take – and the arguments of COMSAT and Lockheed Martin Corporation (“Lockheed Martin”) against any action must fail on the clear evidentiary record that COMSAT has virtual monopoly control over INTELSAT capacity.

In order to remedy the limitations on INTELSAT capacity, the Commission should adopt the network management fee (“NMF”) approach proposed by Sprint and WorldCom, and take certain other actions (including requiring COMSAT not to oppose INTELSAT’s proffered solution to the foreign capacity “matching” problem). The NMF proposal is a moderate one that would apply only in defined circumstances and that would compensate COMSAT for reasonable costs of providing capacity to direct access customers.

## **II. It Is Undisputed That INTELSAT Capacity Limitations Are Impairing Direct Access, Requiring Action Under the ORBIT Act**

The comments in this proceeding make very clear the serious limitations on available INTELSAT capacity. COMSAT states:

Today, nearly 80% of INTELSAT transponders that can access the U.S. are in operational use serving customer demand. The remaining 20% are available for U.S. users, but less than half of them (*i.e.*, only 8% of the total) are in high demand from a U.S. customer requirements perspective, and some of the most desirable

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<sup>4</sup> 47 U.S.C. § 765(b) (as added by § 3 of ORBIT Act).

<sup>5</sup> Id.

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**Reply Comments of Sprint and WorldCom – July 19, 2000**

connectivities are completely sold out. Moreover, some of the capacity that is located in high-demand connectivities is fragmented over numerous transponders, and thus is not useful to users with higher bandwidth needs.<sup>6</sup>

This statement accurately summarizes the detailed capacity data that COMSAT has supplied under protective order.<sup>7</sup> The other commenters (except Lockheed Martin) also note the severe limitations on INTELSAT capacity. Cable & Wireless U.S.A., Inc. (“C&W”) states:

C&W USA has become aware through contacts with other carriers that Comsat Corporation ... has, in an anti-competitive manner, tied up excess capacity on Intelsat such that there is not capacity available for U.S. carriers desiring direct access.<sup>8</sup>

ATC Teleports, Inc. (“ATC”) states:

The most desirable types of Intelsat capacity over North America are the zone and hemispheric beams, which are the best types of capacity for offering Intelsat Business Services (“IBS”). However, at this time, Intelsat has virtually none of this type of capacity left; it has only the less-useful – and more expensive – global capacity left.<sup>9</sup>

There is also agreement that these limitations on availability of capacity are substantially impairing the ability of U.S. carriers to obtain direct access. Sprint and WorldCom provided a substantial amount of data on this point in their initial comments.<sup>10</sup> COMSAT notes that “many customers are aware that capacity to [certain] countries is so limited that they do not even

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<sup>6</sup> Comments of COMSAT Corporation at 7-8 (June 23, 2000) (“COMSAT Comments”) (footnotes and citation omitted).

<sup>7</sup> See id., Confid. Apps. A & B.

<sup>8</sup> Comments of Cable & Wireless U.S.A., Inc. at 2 (June 23, 2000) (“C&W Comments”).

<sup>9</sup> Comments of ATC Teleports, Inc. at 3 (June 23, 2000) (“ATC Comments”).

<sup>10</sup> Comments of Sprint Communications Company L.P. and WorldCom, Inc. at 8-12, Exhs. 1, 2 (June 23, 2000) (“Sprint/WorldCom Comments”).

attempt to pursue these requirements.”<sup>11</sup> ATC states that “not only is direct access pointless for U.S. customers (since there is no capacity to access), it is pointless for a U.S. customer to wait for capacity to become available as contracts end.”<sup>12</sup> C&W states that COMSAT’s virtually monopoly of INTELSAT capacity “will drive up pricing for everyone, and will negatively affect [the] ability to obtain capacity when needed.”<sup>13</sup>

Thus, there is agreement on the key factual question that the Commission must address in making the determination required by the ORBIT Act – i.e., whether “users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements.”<sup>14</sup> As discussed above, the undisputed evidence on the record demonstrates “that [sufficient] opportunity to access [INTELSAT directly] does not exist.”<sup>15</sup> Accordingly, the Commission is required by the ORBIT Act to “take appropriate action to facilitate such direct access.”<sup>16</sup>

### **III. The ORBIT Act Requires Commission Action to Deal With the Shortage of INTELSAT Capacity**

The only real dispute among the parties to this proceeding involves the nature of the actions that the Commission should take under the ORBIT Act. COMSAT and Lockheed Martin

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<sup>11</sup> COMSAT Comments at 7.

<sup>12</sup> ATC Comments at 3.

<sup>13</sup> C&W Comments at 2.

<sup>14</sup> 47 U.S.C. § 765(b).

<sup>15</sup> Id.

<sup>16</sup> Id.

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**Reply Comments of Sprint and WorldCom – July 19, 2000**

argue that no action should be taken at all. These arguments must fail – because the ORBIT Act expressly provides that if available INTELSAT capacity is lacking, “the Commission shall take appropriate action.”<sup>17</sup> The Commission does not have the discretion to ignore this mandatory statutory obligation.

Lockheed Martin argues that the present proceeding should be limited to fact gathering, that the Commission should defer any concrete action on portability, and that any action the Commission takes should be abandoned after privatization of INTELSAT.<sup>18</sup> Given that INTELSAT currently plans to privatize by as early as April 2001,<sup>19</sup> it is plain that Lockheed Martin hopes that delay can avoid any action by the Commission regarding portability of INTELSAT capacity. In fact, such a delay would be directly inconsistent with the ORBIT Act, which clearly mandates “appropriate action” by the Commission in the present proceeding – within 180 days of the enactment of the Act.<sup>20</sup> Moreover, any action by the Commission in this proceeding should remain in effect upon privatization of INTELSAT – unless COMSAT can subsequently demonstrate that it no longer uses control of capacity gained prior to privatization to limit the ability of other U.S. customers to purchase directly from INTELSAT.

COMSAT takes words out of context by claiming that the ORBIT Act permits action “only where it is both ‘necessary’ and ‘appropriate’ to facilitate Level III direct access to

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<sup>17</sup> Id. (emphasis added).

<sup>18</sup> Comments of Lockheed Martin Corporation at 7-10, 17-22 (June 23, 2000) (“LM Comments”).

<sup>19</sup> See INTELSAT, The CEO’s Page, <<http://www.intelsat.com/about/dgspage.htm>> (visited July 13, 2000) (“Completion of privatization is expected as early as April 2001.”).

<sup>20</sup> 47 U.S.C. § 765(b).

INTELSAT.”<sup>21</sup> In fact, the Act requires the Commission to take “appropriate” action if it finds that there is not sufficient INTELSAT capacity to meet the capacity requirements of U.S. users.<sup>22</sup> As discussed above, the facts showing insufficient INTELSAT capacity are undisputed. The Act further requires the Commission to take any further action that “may be necessary to prevent the circumvention of the intent of this section.”<sup>23</sup>

COMSAT further argues that no Commission action is appropriate in this proceeding because the limitations on availability of direct access result from the absolute limitations on INTELSAT capacity, rather than from any improper actions of COMSAT.<sup>24</sup> This argument must fail, for several reasons.

First, COMSAT’s argument is inconsistent with the ORBIT Act. The Act requires Commission action “[i]f the Commission determines that ... opportunity to access [INTELSAT directly] does not exist.”<sup>25</sup> The Act does not state that such action shall be taken only if the unavailability of the capacity is due to misconduct of COMSAT.

Second, even if the ORBIT Act did require evidence that COMSAT has used its position within INTELSAT to monopolize available capacity, there would be no difficulty satisfying that standard. Sprint and WorldCom provided substantial evidence that COMSAT has locked up INTELSAT capacity (as well as engaging in other capacity-related misconduct to extend its

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<sup>21</sup> COMSAT Comments at 2.

<sup>22</sup> 47 U.S.C. § 765(b).

<sup>23</sup> Id. (emphasis added).

<sup>24</sup> COMSAT Comments at 5-25.

<sup>25</sup> 47 U.S.C. § 765(b).

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**Reply Comments of Sprint and WorldCom – July 19, 2000**

monopoly)<sup>26</sup> Other commenters have provided further evidence. C&W states that it “has become aware through contacts with other carriers that Comsat ... has, in an anti-competitive manner, tied up excess capacity on Intelsat ... .”<sup>27</sup> ATC states that “Comsat has put in future reservations on the space segment underlying all its current contracts for capacity, making it impossible for a would-be direct access customer to get those specific frequency assignments either now or in the future.”<sup>28</sup>

Although COMSAT claims that it “has not engaged in any ‘warehousing’ or hoarding of capacity,”<sup>29</sup> a spreadsheet that COMSAT recently provided to WorldCom shows precisely the contrary.<sup>30</sup> This spreadsheet demonstrates that COMSAT’s capacity contracts with INTELSAT typically extend far beyond the end of its customer contracts.<sup>31</sup> That is, even where COMSAT does not have a guaranteed reservation or right of first refusal, it is able to control capacity through long-term contracts. As Sprint and WorldCom explained, INTELSAT contracts typically include a right to “rolling” extensions that effectively allow the contracts to be extended indefinitely.<sup>32</sup> Furthermore, this right to extend contracts applies with respect to both lease capacity and standardized circuits, so that COMSAT’s point that standardized circuits are not

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<sup>26</sup> Sprint/WorldCom Comments at 8-12.

<sup>27</sup> C&W Comments at 2; see also id. at 7.

<sup>28</sup> ATC Comments at 2.

<sup>29</sup> COMSAT Comments at 14.

<sup>30</sup> See Confidential Exhibit 1.

<sup>31</sup> See id., columns O & R.

<sup>32</sup> See Sprint/WorldCom Comments at 10-11.

subject to guaranteed reservations and rights of first refusal<sup>33</sup> does not mean that COMSAT cannot maintain long-term control over this capacity. In addition, as an INTELSAT Signatory COMSAT receives availability and pricing data for standardized circuits before direct access customers, giving COMSAT preferred access to such circuits.<sup>34</sup>

Third, the data provided by COMSAT in this proceeding illustrate the privileged position that COMSAT continues to enjoy with respect to access to INTELSAT capacity. Specifically, COMSAT makes much of a list of 32 COMSAT service orders that “INTELSAT has been unable to accommodate due to capacity constraints, since the implementation of direct access.”<sup>35</sup> Far from showing a level playing field, this data in fact demonstrates that COMSAT continues to have privileged access to scarce INTELSAT capacity. Indeed, at the time of the initial comments, WorldCom alone had been unable to obtain direct access capacity on 146 service orders since implementation of direct access, and 138 additional WorldCom orders remained pending.<sup>36</sup> Considering that COMSAT’s INTELSAT business is several times larger than that of WorldCom, it is plain that COMSAT’s privileged access to INTELSAT capacity make it possible for COMSAT to obtain INTELSAT capacity that its competing U.S. direct access customers cannot obtain. Similarly, COMSAT’s observation that use of direct access capacity by U.S. customers has been increasing<sup>37</sup> is virtually irrelevant in view of the fact that these

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<sup>33</sup> COMSAT Comments at 19.

<sup>34</sup> See Sprint/WorldCom Comments at 11-12.

<sup>35</sup> COMSAT Comments at 6.

<sup>36</sup> See Sprint/WorldCom Comments at 8-9.

<sup>37</sup> COMSAT Comments at 3-5.

customers began from a starting point of zero use of direct access at the time of the Direct Access Order,<sup>38</sup> and still have direct access opportunities that are far inferior to those of COMSAT.

#### **IV. The Commission Should Level the Direct Access Playing Field**

To fulfill its obligations under the ORBIT Act, the Commission must take action that levels the playing field for users of INTELSAT services, making INTELSAT capacity similarly available to direct access customers as it now is to COMSAT. The initial comments of Sprint and WorldCom set out a network management fee (“NMF”) approach that would achieve this result – while preserving the integrity of COMSAT contracts as required by the ORBIT Act.<sup>39</sup>

As an initial matter, a solution relying on commercial negotiations between COMSAT and direct access customers would not realize the goals of the ORBIT Act.<sup>40</sup> A purely market-based solution will not work because the market for INTELSAT services is distorted by the effects of the COMSAT capacity monopoly. Since COMSAT prefers exercising its continued monopoly power to making direct access capacity available on reasonable terms, “commercial negotiation ... has already proven to be fruitless.”<sup>41</sup> While COMSAT makes much of the fact that it recently signed a new contract with WorldCom for INTELSAT service and is negotiating

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<sup>38</sup> Direct Access to the INTELSAT System, FCC 99-236, IB Docket No. 98-192 (rel. Sept. 16, 1999) (“Direct Access Order”).

<sup>39</sup> See 47 U.S.C. § 765(c).

<sup>40</sup> Cf. COMSAT Comments at 27-28; LM Comments at 11-12.

<sup>41</sup> ATC Comments at 4.

with Sprint,<sup>42</sup> these commercial developments demonstrate the opposite of what COMSAT asserts. In fact, WorldCom and Sprint are willing to consider INTELSAT contracts on the terms demanded by COMSAT only because they are unable to make effective use of direct access – due to capacity limitations caused by demand for capacity, the “match” issue described by Sprint and WorldCom, and similar impediments.<sup>43</sup> COMSAT’s efforts to delay or restrict direct access by any means available leaves the Commission with no choice but to take affirmative action under ORBIT Act.

The NMF approach would be a modest, but important step toward equalizing the positions of COMSAT and direct access customers with respect to access to INTELSAT capacity. This approach is quite limited in regulatory scope – in that it would only apply when a contract with COMSAT expires, or when COMSAT seeks to extend the INTELSAT capacity commitments underlying such a contract. Furthermore, the NMF would compensate COMSAT for reasonable costs of providing capacity to direct access customers.<sup>44</sup>

COMSAT argues that an NMF approach would involve rate prescription without statutory authority and without satisfying unspecified “procedural or evidentiary” requirements.<sup>45</sup> To the contrary, a NMF would not involve rate prescription, but would merely assure that U.S. customers would get the benefit of rates set by INTELSAT, which is the goal of the ORBIT Act and the Direct Access Order. Even were the Commission to consider an NMF to involve rate

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<sup>42</sup> COMSAT Comments at 28.

<sup>43</sup> See Sprint/WorldCom Comments at 14-15.

<sup>44</sup> Id. at 13-14.

<sup>45</sup> COMSAT Comments at 33.

**NON-CONFIDENTIAL VERSION - FOR PUBLIC RELEASE**  
**Reply Comments of Sprint and WorldCom – July 19, 2000**

prescription, it would have ample authority to establish an NMF under both the general rate prescription authority of Section 205 of the Communications Act and the “appropriate action” authority of the ORBIT Act. Furthermore, the Commission has plainly satisfied applicable procedural and evidentiary requirements through the notice and opportunity for comment provided by the Portability NPRM. Indeed, in a recent proceeding, the Commission specifically concluded that the procedural requirements of Section 205 were “satisfied by our Notice of Proposed Rulemaking ... which gave all interested parties ample opportunity to present their views.”<sup>46</sup>

COMSAT also argues that an NMF approach would violate the Takings Clause of the Constitution by requiring COMSAT to charge rates not providing an adequate rate of return.<sup>47</sup> To the contrary, COMSAT has no cognizable property interest in using its virtual monopoly on INTELSAT capacity in order to force contract extensions by U.S. customers who would prefer to use direct access – but who cannot do so because of INTELSAT capacity constraints. Accordingly, it would not be a taking of COMSAT property for the Commission to provide that such contracts may be extended upon payment of an NMF that covers COMSAT’s reasonable costs. A reasonable NMF for service to customers like Sprint and WorldCom – who own INTELSAT earth stations and purchase no facilities or services provided by COMSAT – would be approximately two percent.<sup>48</sup>

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<sup>46</sup> International Settlement Rates, 14 FCC Rcd. 9256, 9262 (1999); see also Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (“[W]e hold that the Commission, in capping settlement rates, lawfully exercised its broad powers under section 205(a).”).

<sup>47</sup> COMSAT Comments at 33.

<sup>48</sup> See Sprint/WorldCom Comments at 13 & n.39.

Sprint and WorldCom have also proposed several other Commission actions in this proceeding to deal with certain capacity-related limitations on direct access.<sup>49</sup> The most important of these is a requirement that COMSAT inform INTELSAT that it does not oppose treating transfers of foreign half-circuits in connection with direct access as frequency changes, which would address the foreign capacity “match” issue described by Sprint and WorldCom.<sup>50</sup> Action by the Commission in this area is particularly appropriate because COMSAT’s successful resistance to INTELSAT’s proposed solution to the capacity matching problem was a clear effort to reduce the availability of direct access capacity.<sup>51</sup> To remedy such obstructionist behavior, the Commission has explicit authority under the ORBIT Act to “take such steps as may be necessary to prevent the circumvention of the intent of th[e] section” of the ORBIT Act relating to portability of capacity.<sup>52</sup>

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<sup>49</sup> Id. at 14-15.

<sup>50</sup> Id. at 9-10, 14.

<sup>51</sup> See id. at 10 & Exh. 3.

<sup>52</sup> 47 U.S.C. § 765(b).

**V. Conclusion**

As set out above and in the initial comments of Sprint and WorldCom, the Commission should address the shortage of INTELSAT capacity available to U.S. direct access customers by taking the appropriate actions articulated by Sprint and WorldCom.

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Dated: July 19, 2000

# **Exhibit 1**

**REDACTED**

## CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2000, true and correct copies of the foregoing REPLY COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P. AND WORLDCOM, INC. and the cover letter requesting confidential treatment of Exhibit 1 to same were served via hand-delivery (except where indicated) upon each of the following:

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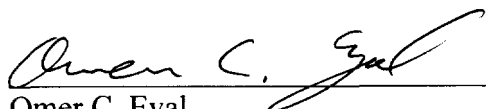
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